

ACOSTA MORA (Migration) [2018] AATA 5090 (4 September 2018)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Ms Maria Monica Del Pilar Acosta Mora

CASE NUMBER: 1715484

DIBP REFERENCE(S): CLF2013/159923 CLF2017/47417

MEMBER: Grant Chapman

DATE: 4 September 2018

PLACE OF DECISION: Adelaide

DECISION: The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa.

Statement made on 04 September 2018 at
4:20pm

CATCHWORDS

1. *Migration – Partner (Residence) (Class BS) – Subclass 801 (Spouse) – insufficient evidence of a relationship – genuine de facto relationship until late 2016 – relationship breakdown – no evidence of a rekindled relationship in 2017 – department dob ins by members of the community about applicant’s ceased relationship – decision under review affirmed*

2.

LEGISLATION

3. *Migration Act 1958 (Cth), s 5CB*
4. *Migration Regulations 1994 (Cth), r 1.09A Schedule 2 cl 801.221*
- 5.

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

6. This is an application for review of a decision made by a delegate of the Minister for Immigration on 6 July 2017 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s.65 of the *Migration Act 1958* (the Act).
7. The applicant, Maria Monica Del Pilar Acosta Mora, applied for the visa on 12 July 2013 on the basis of her relationship with her sponsor, Henry Kidman Reid. At that time, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter, the primary criteria include cl.801.221(2)(c).
8. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.801.221(2) because they were not satisfied that the applicant and sponsor, at the time of the decision, were currently in a genuine and continuing relationship and found that the applicant and sponsor did not live together in that they were living separately and apart on a permanent basis.
9. The applicant appeared before the Tribunal on 21 June 2018 to give evidence and present arguments. The Tribunal also received oral evidence from William Moreno and by telephone, Nancy Tapiero. The Tribunal hearing was conducted with the assistance of an interpreter in the Spanish and English languages.
10. Both prior to and subsequent to the Tribunal Hearing, the applicant provided written personal statements some of which had not been provided to the delegate.
11. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

12. The issue in the present case is whether the applicant and her sponsor are in a de facto relationship, as defined under section 5 CB of the Act at the time of this decision. The Tribunal emphasises that although the narrative of this decision deals also with circumstances of the relationship prior to those directly relevant to this decision, that is for the purpose of providing the applicant with an understanding of the context of its decision.
13. In determining the applicant's claims, the Tribunal must first make findings of fact on material matters in dispute. This may involve an assessment of credibility and in so doing, the Tribunal is aware of the need and importance of sensitivity to the circumstances and difficulties applicants may face before the Tribunal, related to their particular situation.
14. The applicant relies on the verbal evidence given before the Tribunal, together with written submissions and supporting documentary evidence provided to the Tribunal, as well as that provided previously to the Department.

Whether the parties are in a spouse or de facto relationship

15. Relevantly to this matter, cl.801.221(2)(c) requires that at the time of this decision, the applicant is the spouse or de facto partner of the sponsoring partner, who must be an

Australian citizen or Australian permanent resident or an eligible New Zealand citizen who was specified in the Subclass 820 visa application as the spouse or de facto partner of the applicant. In the present case the applicant claims to be the de facto partner of the sponsor who is an Australian citizen and was identified in the related Subclass 820 visa application. On the evidence before it, the Tribunal is satisfied that the sponsor is the 'sponsoring partner' of the applicant.

Are the parties in a de facto relationship?

16. As the parties are not validly married, they cannot satisfy an essential requirement of a spouse relationship, but may meet the criteria on the basis of being in a de facto relationship as defined in s.5CB of the Act. A person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis and the couple are not related by family: s.5CB(2).
17. In forming an opinion whether they are in a de facto relationship, consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3), which is attached to this decision. The Tribunal has considered all aspects of the relationship.
18. The applicant lodged a valid application for a Class UK, subclass 820, Partner (Temporary) visa and Class BS, subclass 801, Partner (Residence) visa on 12 July 2013 on the grounds of being in a de facto relationship with an Australian citizen.
19. The subclass 820, Partner (Temporary) visa was granted on 23 October 2013.

20. Documentation

21. Apart from considering verbal evidence at the Hearing, the Tribunal has examined the following documents as being relevant in considering the evidence regarding the various aspects of the relationship between the applicant and sponsor:
 - 1) Partner Visa application – information for permanent stage processing – Record of Responses.
 - 2) Commonwealth Bank Smart Access joint account in the names of Henry Kidman Reid and Maria Monica Del Pilar Acosta Mora, of [Address 1], Point Cook, Victoria 3030, for the period 1 to 31 October 2014.
 - 3) Commonwealth Bank Smart Access joint account in the names of Henry Kidman Reid and Maria Monica Del Pilar Acosta Mora of [Address 2], Camberwell, Victoria 3124, for the periods 1 to 31 December 2014 and 1 to 30 April 2015.
 - 4) Letter of Demand, dated 26 August 2015, from the Commonwealth Bank to Mr Henry Kidman Reid of [Address 2], Victoria 3124 relating to the Smart Access joint account in his and Maria Monica Del Pilar Acosta Mora's names for payment of \$525.24 unauthorised overdraw plus interest, within seven days.
 - 5) Commonwealth Bank Standard Variable Rate Home Loan account in the name of Henry Kidman Reid of [Address 2], Camberwell, Victoria 3124, for the periods 1 January to 31 December 2015.

22.

- 6) Esanda Car Loan for a period of three years in the name of Mr HK Reid of [Address 3], Richmond, Victoria 3121, dated 25 December 2013 for a 2008 Mazda 3 Neo-S sedan motor vehicle.
- 7) City Mazda Superstore, South Melbourne, Victoria, Contract/Tax Invoice, dated 16 December 2013, for the purchase of a pre-owned motor vehicle by Mr Henry Reid of [Address 3], Richmond, Victoria 3121.
- 8) Vic Roads Certificate of Registration for 2008 Mazda sedan in the name of Henry Kidman Reid of [Address 2], Camberwell, Victoria 3124, for registration from July 2016 to July 2017.
- 9) Youi motor vehicle insurance policy invoices for a 2008 Mazda 3 Neo-S sedan in the name of from 19 December 2013 to 18 December 2014 and 19 December 2014 to 18 December 2015.
- 10) Email from Maria Monica Acosta to Henry Kidman Reid, dated 21 July 2015, showing payment of \$1400 from the joint account to the Esanda.
- 11) Letter from Esanda Recoveries to Mr HK Reid of [Address 2], Camberwell, Victoria 3124, requesting payment of aggregated overdue repayments of \$7288.38 by 23 April 2016.
- 12) Various documents individually in the names of Henry Kidman Reid and Maria Monica Acosta Mora showing that they had the same mailing addresses in Richmond, Point Cook and Camberwell, Victoria between 2013 and 2016.
- 13) DIBP Form 888 from Nancy Tapeiro dated 9 January 2017.
- 14) Royal Automobile Association of South Australia membership confirmation dated 11 October 2017 for Mrs Maria Acosta of [Address 4], Mile End, SA 5031.
- 15) Signed letter from Maria Monica Del Pila Acosta Mora, dated 9 January 2017, addressed to Partner Visas Section, DIBP.
- 16) DIBP document dated 22 March 2017, being a note of a telephone conversation recorded by Departmental Officer Natalia Lucente with Maria Monica Del Pilar Acosta Mora.
- 17) Signed letter from Maria Monica Del Pilar Acosta Mora, dated 13 June 2018, addressed to AAT MRD.
- 18) Signed letter from Maria Monica Del Pilar Acosta, dated 4 July 2018, to Member G.Chapman AAT MRD.
- 19) Two emails dated 16 December 2016 from Maria Monica Acosta Mora to several Navantia (Australia) management personnel alleging that two other employees had provided information to DIBP alleging non-compliance with her visa conditions.
- 20) Letter of Invitation, dated 21 July 201, signed by Maria Monica Del Pilar Acosta Mora and Henry Kidman Reid, addressed to Tourist Visa Section, Embassy of Australia, Santiago, Chile, inviting the applicant's daughter, Maria Catalina, to visit Australia from 3 December 2015 to 13 January 2016.

21) DIBP Form 47 in the name of Maria Monica Del Pilar Acosta Mora lodged with DIBP 12 July 2013.

23. *Financial aspects of the relationship*

24. *Joint ownership of assets/joint liabilities:* No evidence has been provided of joint ownership of any assets by the applicant and sponsor at any time during their relationship, including at the time of this decision. The only evidence of a joint liability is for an unauthorised overdraft showing on the April 2015 statement of their joint bank account (paragraph 15.3 above) and that that was still owing in August 2015 (paragraph 15.4 above). Evidence was provided to the Tribunal Hearing and in the documentation of a Mazda motor vehicle purchased by the sponsor with a loan (paragraphs 15.6 to 15.9 above) but which the applicant claimed was used by her and for which initially she met most of and subsequently, all of, the cost, including the loan repayments. Bank statements for October and December 2014 (paragraphs 15.2, 15.3 and 15.10 above) show direct debit payments for the loan and insurance. However, by April 2015 this bank account was overdrawn for the whole month, with the car loan and insurance payments bouncing.

As discussed in paragraph 17 below, based on the way in which this bank account was operating, the Tribunal concludes that the applicant was responsible for meeting all of the car costs. By early 2016, the car loan repayments were in considerable arrears (paragraph 15.11 above) which prompted a “big discussion” between the applicant and sponsor. The applicant said that “our big problems started on that moment” (paragraph 15.15 above). The Tribunal accepts the applicant’s statement to the Tribunal Hearing that her visa status prevented her from obtaining a loan, so the car and its related loan were in the name of the sponsor but the parties had agreed that the applicant would meet all the car costs. She had failed to do this, resulting in a possible detrimental impact on the sponsor’s credit status, causing problems in the relationship.

The applicant places considerable weight on what was, in effect, her exclusive access to and use of this motor vehicle as being proof of the continuation of the de facto relationship between the parties beyond October, 2016. Despite acknowledging to the Department of Immigration and Border Protection in March 2017 that she and the sponsor were no longer living together and that she hadn’t spoken to him for at least two months, she claimed that “the fact that the sponsor permits her to keep the car means that they still have ‘something’ as it wouldn’t make sense for the sponsor to let her keep and use the car if they are no longer together” (paragraph 15.16 above). On the contrary, the Tribunal finds that although the sponsor was willing to assist the applicant to purchase a car while they were in a relationship, absent her ability to obtain a loan, it was always accepted between the parties that the applicant would be responsible for meeting all its costs. Given the applicant’s evidence that the sponsor had his own car, it is unlikely that he would wish to take ownership of the car, notwithstanding the end of the relationship and simply insisted that the applicant meet the liabilities, as agreed. To the extent, if any, that the joint bank account continued to be overdrawn beyond April 2015, it would have created a joint liability. The Letter of Demand (paragraph 15.4 above), indicating that the unauthorised overdraft evident on the April 2015 account had not been repaid, is the only evidence or documentation regarding the joint bank account beyond April 2015 available to the Tribunal.

25. *Extent of pooling of financial resources:* No evidence of the pooling of financial resources at the time of this decision has been provided to the Tribunal. The most recent bank statement provided for the joint account (paragraph 15.3 above) is for the month of April 2015. This is identified as statement number 26 and only two other statements (paragraph 15.2 and 15.3 above), being 20 and 22, have been provided to April 2015, that is three statements out of a total of 26, covering the previous three years. No evidence has been presented to the Tribunal as to whether this joint account remains in operation. Detailed examination of the three statements provided does not reveal any pooling of financial resources. There is evidence of deposits from all three of the applicant’s employers during that period. On the

expenditure side, there is evidence of expenditure attributable to only one debit card, together with debits relating to the motor vehicle, as described in paragraph 16 above. While there are a few withdrawal transactions on the October and December 2014 statements which may be regarded as attributable to daily living expenses for a couple, most of the transactions could be attributable to expenditure incurred by and for one person. There is no discernible evidence of the sponsor operating on this account.

The pattern of expenditure evident in the April 2015 account is quite different from the earlier two and is indicative of the applicant having moved to Adelaide with her Navantia employment. The applicant's salary was credited to the account on 30 April 2015, putting the account into credit. None of the day-to-day withdrawals evident in the October and December 2014 statements appear in April 2015. The only debits are direct debits relating to the Mazda motor vehicle and to Cash Converters, which appear on the earlier statements and there are two new direct debits on this statement, being to Newmark Real Estate and Dodo Services, probably reflecting the applicant's new residential location in Adelaide, together with three substantial ATM withdrawals at West Lakes, South Australia, the combined affect of which was to put the account back into overdraft for a greater amount than before the salary was deposited.

On the evidence available, the Tribunal concludes that there was no pooling of financial resources after the applicant moved to Adelaide, including at the time of this decision. It further concludes that there is very limited evidence of pooling of financial resources prior to that.

26. *Any legal obligations owed to the other party:* No verbal or documented evidence has been provided that either of the parties had or have any legal obligations to the other.
27. *Any sharing of day-to-day household expenses:* As observed in paragraph 17 above there is very limited evidence from the joint bank account statements available to the Tribunal of sharing of household expenses. In two of her written statements (paragraphs 15.1 and 15.17 above) the applicant made brief references to shared living expenses which lacked detail. From the evidence, it is difficult to assess the extent of shared living expenses but the Tribunal does accept that some sharing occurred until around the middle of 2015. However, the Tribunal concludes that, at the time of this decision, there was no sharing of living expenses.
28. *Financial aspects conclusion:* The Tribunal concludes that there is inadequate evidence regarding the financial aspects of the relationship at the time of this decision to support the contention that it is one exhibiting a mutual commitment to a shared life to the exclusion of others, being a genuine and continuing relationship and that the parties are living together on a permanent basis.
29. *The nature of the household*
30. *Any joint responsibility for the care and support of children:* The applicant has a 12-year-old daughter who has been living with the applicant's sister in Brazil since the applicant first arrived in Australia in 2010. The daughter made a brief visit to Australia in December 2015/January 2016 and the Tribunal accepts the evidence of the applicant that the sponsor spent some time with her and her daughter during this visit. However, apart from that, there is no evidence that the sponsor has taken any responsibility for the care and support of the applicant's daughter.
31. *The living arrangements of the applicant/sponsor:* There are some discrepancies in the available documentation regarding the living arrangements of the applicant and sponsor. The applicant's original DIBP Form 47 SP (paragraph 15.21 above) states that she first met the sponsor at the Optus store in Melbourne on 11 January 2012 and that their de facto relationship began on 8 April 2012. Her permanent stage processing Record of Responses

form says also that their relationship began on 8 April 2012 (paragraph 15.1 above). However, her subsequent written statement (paragraph 15.15 above) declares that she “met Henry on one day of April 2012, in the afternoon at the Optus premises on the corner of Collins Street and Elizabeth Street in Melbourne, we started dating and our relationship began step-by-step; in a few months we decided to start living together in the apartment on Rob Street and later we moved....”

Despite this uncertainty, the Tribunal accepts that the applicant and sponsor commenced living together at least from early in the second half of 2012 and did so until the applicant moved to Adelaide sometime early in 2015. The applicant claims that over the ensuing period until October 2016, the relationship continued with periodic shared living arrangements through her visits to Melbourne or the sponsor’s visits to Adelaide. She said she would fly to Melbourne and he would drive to Adelaide. She claimed that the sponsor’s visits to her in Adelaide resumed in April 2017 and continued until September 2017 but acknowledged that they had been completely separated since then. The Form 888 from Nancy Tapeiro (paragraph 15.13 above) confirms that on one occasion in July 2016 she met the applicant and sponsor together at West Lakes Shopping Centre when she had to collect a work-related document on a weekend to take to Canberra. Her statement refers also to regular telephone calls from the sponsor to the applicant at the applicant’s workplace during this period and of one occasion when she invited the applicant for dinner and the applicant refused because she was travelling to Melbourne to spend the weekend with the sponsor. In her verbal evidence by telephone to the Tribunal Hearing she said that on another occasion, when she had to collect documents from the applicant at her Adelaide residence, the sponsor opened the door. She stated to the Tribunal Hearing that she was aware that the relationship finished in October 2016 and that she had no further information about whether it had resumed for a period during 2017. Despite having the opportunity at the Hearing, the applicant provided no response to this evidence. However, in her subsequent letter (paragraph 15.18 above), the applicant claimed that Nancy Tapeiro “was confused on the telephone interview because she only mentioned what happened in May 2016....., however after the hearing I spoke with her, I believe that there was a confusion...” The Tribunal has listened carefully to the audio recording of that period of the Hearing. There is no indication of confusion on the part of the witness. She was quite clear in saying that from October 2016 the applicant and sponsor were not together anymore and that she was unable to provide any further information on the relationship after that.

William Moreno, who attended and gave evidence at the Tribunal Hearing, told the Tribunal that occasionally he spoke to the sponsor in JB Hi – Fi, Melbourne, where the sponsor worked and where Mr Moreno bought computer equipment from time to time. During 2015 and 2016 the sponsor spoke of his visits to the applicant in Adelaide. The witness was uncertain regarding any visits which may have occurred in 2017.

Although there is no other evidence regarding the claimed exchanges of visits between the applicant in Adelaide and the sponsor in Melbourne, such as airline boarding passes on the part of the applicant, the Tribunal accepts that periodic visits occurred and that the relationship continued in some form until October 2016. However, the Tribunal concludes that there is insufficient evidence to accept that the relationship was rekindled for the period April to September 2017.

Apart from the absence of independent evidence, given her interaction with the Department in December 2016, January 2017 and March 2017, the applicant would have been aware of the importance of this aspect of the relationship with regard to the decision being made by the delegate. Given that the delegate’s decision was not made until July 2017, the Tribunal concludes that had her relationship with the sponsor resumed in April 2017, as she claims currently, she would have advised the Department of this at the time.

While the Tribunal was willing to listen to the applicant’s claims about there being a period of reconciliation in mid-2017, it advised the applicant that the relevant time regarding the nature of the relationship was the time of the Tribunal decision, not any other time. In any event, the Tribunal reiterates its conclusion that there is insufficient evidence to accept that the applicant and sponsor resumed shared living arrangements from April to September 2017,

which was during the time of the delegate's decision. Irrespective of that, the applicant's own evidence to the Tribunal Hearing acknowledged that there has been no shared living arrangements between September 2017 and this decision of the Tribunal.

32. *Any sharing of responsibility for housework:* The Tribunal accepts the evidence of the applicant, albeit brief, that prior to the applicant moving to Adelaide, the regular household chores of cooking, cleaning and washing were shared between them. However, since the relationship has concluded, this is no longer the case.
33. *Household aspects conclusion:* The Tribunal concludes that despite the separated living arrangements after the applicant moved from Melbourne to Adelaide, some aspects of the combined household arrangements which could be expected in a genuine and continuing relationship may have persisted until October 2016. However, beyond that date, the nature of the household has not been one exhibiting a mutual commitment to a shared life to the exclusion of others, being a genuine and continuing relationship and that the parties have been living together on a permanent basis.
34. *The social aspects of the relationship*
35. *Whether the persons represent themselves to other people as being in a de facto relationship with each other:* Based on the evidence of the witnesses to which reference is made in paragraph 22 above, the Tribunal accepts that the applicant and sponsor represented themselves as being in a de facto relationship until around September/October 2016. However, there is no evidence that this was the case after that. In particular, the Tribunal finds that at the time of this decision, they have not been representing themselves to others as being in a de facto relationship.
36. *The opinion of friends and acquaintances about the nature of the relationship:* Evidence suggests that friends and acquaintances saw the relationship as genuine prior to October 2016. However, there is no evidence from friends and acquaintances confirming the genuine continuation of the relationship beyond that date. William Moreno told the Tribunal Hearing that he believed that the relationship was genuine "at the time," that time being between 2012 and 2016. He said that sometime in the Spring of 2017, between August and October (he couldn't remember exactly when) the applicant had rung him because she had attempted on a number of occasions to ring the sponsor without success. She asked him to ring the sponsor, which he did and the sponsor answered the call. The Tribunal asked the witness whether the applicant had asked him to speak to the sponsor about the state of the relationship and he told the Hearing that the purpose of the call was about the Mazda car, not about the relationship. The applicant confirmed to the Hearing that this was the case. In her Form 888, Nancy Tapeiro wrote "Once I asked Maria Monica how was the relationship and she told me she preferred not to talk about it. I assume things were not going well. It was around September last year" (2016). In her evidence at the Tribunal Hearing she said that she knew that the applicant and sponsor had problems with their relationship and that the relationship had finished in October 2016.
37. *Any basis on which the persons plan and undertake joint social activities:* The applicant has acknowledged that even during the period in which she claims and the Tribunal accepts that the relationship was active, until October 2016, she and the sponsor engaged infrequently in social activities, apart from occasional dinners and a range of activities during the brief visit of her daughter to Melbourne (paragraphs 15.1 and 15.17 above). There is no evidence of any joint social activities beyond September 2016.
38. *Social aspects conclusion:* The Tribunal concludes that the evidence supports the existence of a genuine relationship until September 2016. However, the evidence beyond that date is that the nature of the social aspects of the relationship between the applicant and sponsor

has not been one which exhibits a mutual commitment to a shared life to the exclusion of others, being a genuine and continuing relationship and that they have been living together on a permanent basis.

39. *The nature of the persons' commitment to each other*

40. *The duration of the relationship:* As discussed in paragraph 22 above, the Tribunal accepts that the relationship had commenced by early in the second half of 2012. This was accepted also by the delegate, in that the applicant's 820 temporary Partner visa was approved on 23 October 2013. Evidence suggests also that the relationship continued until October 2016, albeit with elements of instability during that period (paragraphs 15.1, 15.15 and 15.17 above). However, all of the available evidence indicates that the relationship had ended by October 2016. There is insufficient evidence to support the applicant's claim that it was restored between April and August 2017 and at the time of the delegate's decision. Irrespective, it is clear that the relationship has ended at the time of the Tribunal's decision. The Tribunal accepts that the relationship had existed for a little more than a year the time of the approval of the applicant's 820 temporary Partner visa and for a further three years after that but had concluded by October 2016.
41. *The length of time during which the persons have lived together:* The Tribunal accepts that the applicant and sponsor lived together from just after the middle of 2012 until around April 2015, a period of approximately two and three-quarter years. For a period of approximately eighteen months thereafter, with the applicant living in Adelaide and the sponsor living in Melbourne, the Tribunal accepts that they visited each other intermittently but this should not be described as living together.
42. *The degree of companionship and emotional support the persons draw from each other.* The applicant has described several examples of the companionship and emotional support which the parties provided to each other prior to October 2016 and especially before April 2015. At different times, both had suffered health issues during this period, including the sponsor's epilepsy and provided strong support for each other. However, it was evident also during this time that there were periods of emotional stress and the applicant was uncomfortable with the sponsor's relationship with his friends and family (paragraphs 15.1, 15.15, 15.17 and 15.18 above). There is no evidence before the Tribunal of shared companionship and emotional support beyond October 2016.
43. *Whether the persons see the relationship as a long-term one:* It may have been the case that the parties saw the relationship as long-term at the time of application and approval of the applicant's 820 temporary Partner visa and at the time that the review of eligibility for her 801 Partner Residence visa commenced. However, as described in the above paragraphs, the relationship, in effect, had terminated by October 2016. Irrespective of what may or may not have happened during several months from April 2017, the applicant's own evidence to the Tribunal Hearing confirms her subsequent inability to contact the sponsor, at the very least, since Spring 2017 and her request to William Moreno to do so regarding the car, as described in paragraph 26 above. She has conceded that the lack of contact has continued until the time of this Tribunal decision. This leads the Tribunal to conclude that the parties no longer see the relationship as a long-term one.
44. *Commitment conclusion:* The Tribunal concludes that the parties maintained a commitment to each other between mid-2012 and mid-2015 but that this commitment deteriorated once they were no longer living together on a continuous basis, after the applicant moved to Adelaide and ceased to exist entirely from October 2016. Subsequent to that date and in particular, at the time of this decision, the Tribunal concludes that the nature of the persons' commitment to each other is not one exhibiting a relationship between the applicant and

sponsor as being a mutual commitment to a shared life to the exclusion of others, being a genuine and continuing relationship and that they are living together on a permanent basis.

45. *Any other relevant considerations*

46. The applicant, over the course of this review, both in written communications and in statements at the Tribunal Hearing, has raised several issues which she believes support her case for remittal of the delegate's decision. However, the Tribunal concludes that her arguments arise from a misunderstanding of migration law on these matters, as discussed as follows. In response to the delegate's request for further information regarding the status of her relationship with the sponsor, the applicant wrote a detailed letter on 9 January 2017 in which she acknowledged that "after October 2016, we no longer have communication" (paragraph 15.15 above). However, the bulk of that letter deals with aspects of the relationship well before October 2016, including aspects as far back as prior to the granting of the applicant's 820 temporary Partner visa. The applicant appeared to misunderstand that the key issue in January 2017 was the nature of the relationship at the time of the delegate's decision, which would be at some time after January 2017, when the delegate had concluded all of their investigations regarding the current state of the relationship, as required by the relevant legislation.

Similarly, at the Tribunal Hearing the applicant reiterated the earlier history of the relationship. In the 22 March 2017 telephone interview with the delegate, the applicant confirmed that she had not been living with the sponsor since October 2016, that she last spoke to him on 18 January 2017, that she had been unable to speak to him about a friend relating to her that she had seen the sponsor kissing another girl and that she didn't know when they will live together again. She then referred in some detail to the circumstances regarding the Mazda motor vehicle as being sufficient confirmation of the continuation of a de facto relationship.

In her letter to the Tribunal dated 13 June 2018, prior to the Hearing, the applicant again refers to several aspects of the relationship prior to the October 2016 separation, refers in some detail to the motor vehicle situation and complains that process is unfair "I find it unfair that immigration took two years to assess my application. In two years can happen to many different things in persons' life" (paragraph 15.17 above). The Tribunal finds that there are several points to be made with regard to this comment. First, when contacted by the applicant, the Department had advised the applicant of the substantial number of visa cases under consideration and the resulting backlog and delay. The legislation sets no time frame within which a decision must be finalised. Secondly, the Department received information on 31 July 2015 that the applicant's relationship was contrived. Further investigation of that information by the Department may have added to the delay resulting in not seeking, until December 2016, a response from the applicant regarding her current situation. The applicant suggests a confusion of dates by the Department on this issue, because the issue of a work colleague apparently raising her relationship status with the Department did not occur until November 2016. However, it should be noted that the Department on 31 July 2015 recorded information that some people in the Colombian community knew that she didn't have any true relationship with her sponsor. Therefore, the assumption by the applicant that the only source of information regarding her relationship was from her work colleagues may be incorrect. The Department's letter to her, dated 15 December 2016, seeking a response, regarding information on a contrived relationship does not specify the source of that information.

Whatever the reason for the time taken by the delegate to finalise the decision, it is not relevant. Clause 801.22 of the legislation is quite specific in requiring that the criteria are to be satisfied at the time of decision, irrespective of when that decision is made. The delegate determined that at the time of their decision in July 2017, the criteria were not satisfied. More importantly, at the time of the Tribunal's decision, the evidence is clear that the relationship has been terminated.

The applicant further misunderstands the legislation in her letter to the Tribunal, dated 4 July

2018, after the Hearing. She seeks to invoke the “long-term partner relationship” provision. However, this provision only allows a decision to be made earlier than two years after the visa application was made. It does not remove the requirement for all of the criteria to be met at the time the decision is made. Furthermore, this provision applies to a relationship of not less than three years standing at the time of visa application. The date of the applicant’s visa application was 12 July 2013, at which time the applicant and sponsor had been in relationship for barely 12 months, not three years. In this instance, the applicant appears to be confusing the date of visa application with the date at which the Department commenced its post-two year review of the application, in mid-2015. Therefore, contrary to the applicant’s claim in the penultimate paragraph of that letter that “at the moment that I was applying for the permanent residency, I was with him in a long-term de facto relationship,” at the time of application, being 12 July 2013, the relationship was of approximately 12 months duration, which does not meet the definition of long-term.

In the letter, the applicant refers to the circumstances to be considered under 1.09A (3) in considering whether all of the circumstances of a relationship meet the requirements to determine that a de facto relationship exists between parties. She purports to list all of the criteria included in the above regulation. However, tellingly, she omits (3) (d) (iv) - whether the persons see the relationship as a long-term one. She then refers to a series of events prior to the separation of the applicant and sponsor which may represent compliance during that earlier period with the circumstances she quotes. However, she makes no reference to events relevant to those circumstances after October 2016. More importantly, given its omission from her list, she makes no comment on whether she and the sponsor saw the relationship as a long-term one, even at that earlier time. The Tribunal concludes that this circumstance was not present after October 2016.

47. *Conclusion*

48. The Tribunal concludes that, from at least October 2016, on the evidence before the Tribunal, the applicant has not been in a de facto relationship. However, in making its decision on this appeal, the Tribunal emphasises that it has not relied on the evidence narrated in this decision which leads to that conclusion. Rather, it accepts the evidence, including that of the applicant, that the applicant and sponsor are not in a de facto relationship at the time of this decision. Therefore, the Tribunal concludes that at the time of this decision the applicant is not in a de facto relationship.
49. For the above reasons, having carefully considered all of the circumstances of the relationship and each of the prescribed factors under s.5CB(2)(a)-(c) the Tribunal is not satisfied that at the time of this decision, the visa applicant and her sponsor are in a genuine and continuing relationship and have a mutual commitment to a shared life together to the exclusion of others and live together, or not separately or apart on a permanent basis.
50. On the basis of the above the Tribunal is not satisfied that the requirements of s.5CB(2) are met at the time of this decision. Therefore, the applicant does not meet cl.801.221(2)(c).
51. Furthermore, the applicant has not claimed, and there is no evidence before the Tribunal, that the applicant meets the alternative criteria in cl.801.221 (2A), (3), (4), (5), (6) or (8). Therefore, the Tribunal concludes that the applicant does not meet cl.801.221.
52. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

53. The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa.

Grant Chapman
Senior Member

ATTACHMENT - Extract from Migration Regulations 1994

1.09A De facto partner and de facto relationship

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits the regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:

- (a) a Partner (Migrant) (Class BC) visa; or
- (b) a Partner (Provisional) (Class UF) visa; or
- (c) a Partner (Residence) (Class BS) visa; or
- (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:

- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
- (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
- (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
- (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.

- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).